IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

NO. 76-282

DR. DON M. SMART, *Petitioner*,

v.

CLARENCE JONES, ET AL, *Respondents*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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The Petitioner, Dr. Don M. Smart, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on April 15, 1976.

OPINION BELOW

The District Court granted the Respondents' motion for summary judgment on May 30, 1975. Petitioner's motion to set aside summary judgment and for a change of venue was denied on June 17, 1975. This was affirmed by the Fifth Circuit on April 15, 1976, and Petitioner's motion for rehearing en banc was denied on May 19, 1976.

JURISDICTION

Jurisdiction is found upon the Fifth and Fourteenth Amendments to the United States Constitution; Title 28 U.S.C. Sections 1331, 1343, 2201; and Title 42 U.S.C. Sections 1983, 1985 (2)(3), and 1986.

The judgment in the Court of Appeals for the Fifth Circuit was entered on April 15, 1976 and a timely petition for rehearing en banc was denied on May 19, 1976, and this petition for certiorari was filed within ninety days of that date. This Court's jurisdiction is invoked under 28 U.S.C. Section 1254(1).

QUESTIONS PRESENTED

1. Does a Texas capias meet the Constitutional due process requirements of an arrest warrant?

2. Can a separate unrelated condemnation case, without an arrest, *Smart v. Texas Power & Light Company*, 525 F.2d 1209 (5th Cir. 1976), involving a portion of 550 acres in Collin County, Texas, in which the commissioners' award was made and drawn down two years before Texas Power & Light Company initiated the present proceeding, resolve any of the issues in this present case as to a portion of 35 acres in Dallas County, Texas, in which there was not even a commissioners' hearing and there was an arrest on alleged criminal charges.

3. Is it denial of due process and equal protection of the law for the Senior Federal District Court Judge, who had been employed by two of the respondents and was a law partner of one of the respondents to enter an order transferring this case from another docket to his own docket; for the Senior Federal District Court Judge to state at a conference that he was not holding a hearing and then entering an order holding he had held a hearing; and for the Senior Federal District Court Judge

to apply collateral estoppel or res judicata in the case of *Nancy G. Smart v. Clarence Jones et al*, when the trial judge of that case, Judge Sarah T. Hughes, ruled at the request of respondent John Tolle that the cause of action of Dr. Don M. Smart was not to enter the case of Nancy G. Smart?

4. Is judicial immunity a denial of due process and equal protection of the law pursuant to the Fifth and Fourteenth Amendments to the Constitution of the United States?

STATEMENT OF THE CASE

Petitioner, Dr. Don M. Smart, is a duly licensed physician and duly licensed attorney, who was the victim of multiple criminal acts by Respondents, Dallas County Deputy Sheriffs, who trespassed onto his private homestead property, imprisoned him on his private property, assaulted him on his private property, assulted him on a public highway, and broke into his private medical office. All these acts occurred prior to obtaining a capias for arrest on alleged criminal acts. After obtaining a capias Respondents broke into his private medical office and forcibly took Dr. Smart to jail without a warrant although he was doing nothing more at the time than seeing medical patients. He was illegally placed in jail, mug shot, fingerprinted, deprived of his liberty, a criminal arrest record made, and falsely accused of criminal acts with the aid and abetment of the Dallas County District Attorney's office. All the foregoing occurred in order to deliver to Dr. Smart a void notice of condemnation valuation hearing that had expired and to which he was not legally bound to respond and was illegally initiated by Texas Power & Light Company.

This is a fight by an individual physician-attorney, who knows his rights, to protect his private property and personal rights

and sought to enjoy them, and to hold public officials accountable for illegally depriving him of his liberty. This one individual has taken on a huge corporation who pays Dallas County Deputy Sheriffs to deliver their notices of condemnation, which is not an official duty of the Sheriff or a civil process, in order to intimidate and coerce private landowners.

The basis of this whole proceeding was the initiation of a condemnation proceeding by J. F. Skelton, president of Texas Power & Light Company, who in 1972 without authority of a corporate resolution ordered the condemnation of Dr. Smart's property. The proceeding was void, *Burch v. City of San Antonio,* 518 S.W.2d 540 (Tex.Sup.Ct. 1975). Robert E. Burns, the company's attorney, sent this notice to the Dallas County Sheriff's department to deliver although it is not their official duty, *Texas Attorney General's Opinion* (No. C-164, October 1963), which specifically informed the Dallas County District Attorney this was not an official act for the Sheriff's department. The Sheriff's department treated this as an official duty and act and trespassed on Dr. Smart's property and assaulted him in order to deliver this notice although Mr. O'Byrne Cox, Respondent Grandstaff's superior, stated Grandstaff had no business being on Dr. Smart's property if he did not have a civil process to serve. The Respondents did not offer any defense whatsoever to Grandstaff trespassing onto Dr. Smart's homestead, blocking his lane, assaulting him by following his car in a dangerous and threatening manner, breaking into his office without either a search, arrest warrant or capias and threatening his employees. The age-old police trick of contriving a crime to deliver a paper was initiated and executed with the help of the Dallas County District Attorney's office.

The Dallas County District Attorney's office after consultation with their clients in the Sheriff's department, in which existed a client and attorney relationship, charged Dr. Smart with aggravated assault which was not of substance or merit whatsoever, and they dismissed this charge after some nine months. District Attorney Henry Wade and Assistant District Attorney John Tolle refused to submit to depositions by Dr. Smart in trial court and ignored the motions to compel them to appear. The chief civil litigator of the Dallas County District Attorney's office, John B. Tolle, took over the prosecution of Dr. Smart in the criminal case while at the same time defending his clients against Petitioner's civil rights suit.

This political "hot potato" case was before two federal judges when the Chief Judge in Northern District of Texas finally by his own order (Tr. p.171) transferred the case to himself and disposed of it by summary judgment pursuant to Fed. R. Civ. P. 56 while stating at a pretrial conference he was not holding a hearing. During the proceedings in chamber Dr. Smart protested at all times as to the accuracy of Respondents' representations by their attorneys, but this was ignored and the summary judgment recited there were not any material facts in controversy although the Respondents refused to answer some 212 admissions, refused to give depositions, and filed general denials to Dr. Smart's 35 page complaint. The trial court acted entirely on the "hearsay" statements of Respondents' attorneys and granted the summary judgment of Respondents based upon the case of *Nancy G. Smart v. Jones, et al,* Cause No. CA-3-64?3-B, aff. 493 F.2d 663, Cert. den. 420 U. S. 939 95 Sup. Ct. 1151, 43 L. Ed. 2d.417 (1975). The trial court ignored the fact that in the case of *Nancy G. Smart* trial judge Sarah T. Hughes specifically ruled that the case of *Don M. Smart* was

not to enter that case and no jury issues were presented as to the cause of action of Petitioner and this was done specifically at the request of Respondent John Tolle, and recited there was no issue or material fact although Dr. Smart's request for a discovery were ignored as were his multiple motions, which is not surprising in view of the relationship of the parties.

This is simply another case of abuse of power by public officials but not of the Watergate type public interest in order to provoke careful judicial scrutiny. For example, the recitation by the Fifth Circuit of *Smart Vs. Texas Power & Light Company*, 525 F.2d 1209 (Fifth Circuit 1976) involved a portion of 550 acres of land in Collin County, Texas, on which Dr. Smart drew down the commissioners' condemnation award in 1970 occurred without an arrest some two years before Texas Power & Light Company again initiated condemnation proceedings against a portion of his 35 acre homestead in Dallas County, Texas, in which there was not even a commissioners' hearing or an award and Dr. Smart was arrested to support a claim of jurisdiction. The cases are separated by two years, 515 acres, 35 miles and a commissioners' award and drawing down the award in Collin County and none in Dallas County and an arrest in Dallas and none in Collin County. The only similarity is the names of some of the parties involved as the issues were completely unrelated.

REASONS FOR GRANTING THE WRIT

1. THE DECISION BELOW ERRED IN HOLDING A TEXAS CAPIAS MEETS THE CONSTITUTIONAL DUE PROCESS REQUIREMENTS OF AN ARREST WARRANT.

The acts Dr. Smart is complaining of all occurred before the Deputy Sheriffs obtained a capias. The Fifth Circuit confused

the capias as being what Respondents claimed was a civil process. What Respondents claimed to be a civil process was a notice of a commissioners' hearing which was neither issued by a court or a magistrate and at the time of trespassing on Dr. Smart's property had already expired. Subsequent to their illegal acts the Dallas County Deputy Sheriffs sought to obtain a warrant of arrest from a magistrate and were refused. They then with the aid and abetment of the District Attorney's office obtained a capias which Respondents apparently became aware was not a warrant as their original answer of September 28, 1973 set forth "capias or warrant" (Tr. p. 44) and then omitted the word warrant in their first amended original answer filed October 5, 1973 (Tr. p. 61, par. 7). Respondents' exhibit of the capias (Tr. p. 66) showed on its face that it was issued by Tom Ellis, who is the Dallas County Clerk for all matters including marriage licenses and deed records, and it was rubber stamped by Clyde Sims, merely one of a large number of deputy clerks selected and employeed by the General Clerk, Tom Ellis, who is elected in a general election.

Respondent Grandstaff went to a magistrate to get a warrant for Dr. Smart without success. (Grandstaff deposition, December 7, 1972, page 58, in the case of *Nancy G. Smart v. Clarence Jones et al*, No. CA-3-6478-B).

The Texas Code of Criminal Procedure sets forth the requisites of a warrant:

> ARTICLE 15.01 Warrant of arrest
>
> A "warrant of arrest" is a written order from a magistrate, directed to a peace officer or some other person specially named, commanding him to take the body of the person accused of an offense, to be dealt with according to law.

ARTICLE 15.02 Requisites of warrant

It issues in the name of "The State of Texas", and shall be sufficient, without regard to form, if it have these substantial requisites:

1. It must specify the name of the person whose arrest is ordered, if it be known, if unknown, then some reasonably definite description must be given of him.

2. It must state that the person is accused of some offense against the laws of the State, naming the offense.

3. It must be signed by the magistrate, and his office be named in the body of the warrant, or in connection with his signature.

The Deputy Sheriffs refer to a capias as a "walk through" inasmuch as they just walk through papers and a clerk stamps the papers without the intervention of a magistrate. The Texas Code of Criminal Procedure sets forth the requisites of a capias:

ARTICLE 23.01 Definition of a "capias"

A "capias" is a writ issued by the court or clerk, directed "To any peace officer of the State of Texas", commanding him to arrest a person accused of an offense and bring him before that court immediately, or on a day or at a term stated in the writ.

ARTICLE 23.02 Its requisites

A capias shall be held sufficient if it have the following requisites:

1. That it run in the name of "The State of Texas";

2. That it name the person whose arrest is ordered, or if unknown, describe him;

3. That it specify the offense of which the defendant is accused, and it appear thereby that he is accused of some offense against the penal laws of the State;

4. That it name the court to which and the time when it is returnable; and

5. That it be dated and attested officially by the authority issuing the same.

This is an unlawful method used by the Dallas County District Attorney for the imposition of summary punishment when the District Attorney desires an arrest to be made and is unable to obtain the cooperation of a judge. The exercise by the District Attorney of an option to proceed by the warrant statute or to avoid the intervention of a magistrate to accomplish the arrest and incarceration of a citizen is a clear denial of Constitutional due process. The requirement of the intervention of a fair and impartial magistrate before the arrest and incarceration of a citizen at a subsequent time and far removed from the scene of the alleged crime is fundamental. The capias as used against the Petitioner, by Respondents, is a "by-pass" to avoid fundamental due process.

The requirements for the issue of search warrants and arrest warrants are the same, *Aguilar v. Texas*, 378 U.S. 108, 112 n3 (1964). The standard by which the validity of warrants are to be judged are the same whether federal or state officers are involved, *Ker v. California*, 374 U. S. 23 (1963). A subpoena issued by a District Attorney cannot qualify as a valid search warrant, *Mancusi v. DeForte*, 392 U.S. 364, 370-372 (1968).

The purpose of a Texas capias was to provide the means of arrest for an individual who had been previously before a magistrate and was not to take the place of an arrest warrant. The complaining witness, Deputy Sheriff Grandstaff, was also the person who obtained the capias and made the arrest so that he was aware of all the inherent defects and false allegations in the affidavit, information, and capias. The Respondents did not even comply with the mandate of the capias that Dr. Smart should be taken immediately before County Criminal Court

No. 2. Instead, he was placed in jail in order that they could obtain their purpose of imposing summary punishment without the intervention of a magistrate.

2. THE DECISION BELOW ERRED IN GRANTING A SUMMARY JUDGMENT FOR TEXAS POWER & LIGHT COMPANY BASED UPON *SMART V. TEXAS POWER & LIGHT COMPANY*, 525 F.2d 1209 (5th Cir. 1976) WHICH INVOLVED A PORTION OF 550 ACRES IN COLLIN COUNTY WITHOUT AN ARREST IN WHICH A CONDEMNATION AWARD WAS DRAWN DOWN BY DR. SMART IN 1970 WHILE THE PRESENT CASE WAS A PORTION OF HIS 35 ACRE HOMESTEAD IN DALLAS COUNTY, TEXAS, IN WHICH NO AWARD WAS EVEN MADE AND HE WAS ARRESTED.

The Fifth Circuit simply confused an unrelated case with the same style in which a commissioners' award was drawn down by Dr. Smart two years before condemnation in the present case was even initiated. The judgment rendered in favor of Texas Power & Light Company in the prior case was based upon a presumption of consent to the taking on the withdrawal of the commissioners' award. No arrest was involved in that case, while the present case involved a portion of 35 acres in Dallas County, Texas. Dr. Smart was arrested in order to attempt to intimidate him and confiscate his property. When Dr. Smart resisted, Texas Power & Light Company abandoned their attempt to condemn his property and withdrew their condemnation proceedings. The Fifth Circuit was simply confused because the unrelated cases were styled the same, but in reality the issues were completely different. There was a time difference of two years, a land difference of a portion of 515

acres and a distance separation of 35 miles, and no arrest vs. an arrest. In medical malpractice parlance the Fifth Circuit operated on the wrong patient.

3. THE DECISION BELOW ERRED IN DENYING PETITIONER DUE PROCESS AND EQUAL PROTECTION OF THE LAW AS THE SENIOR FEDERAL DISTRICT COURT JUDGE CONFESSED IN HIS ORDER ENTERED ON JUNE 17, 1975 THAT HE HAD PREVIOUSLY BEEN EMPLOYED BY ONE OF THE DEFENDANTS, HAD BEEN A LAW ASSOCIATE OF ANOTHER DEFENDANT AND HAD BEEN EMPLOYED BY THE DALLAS COUNTY DISTRICT ATTORNEY'S OFFICE PREVIOUSLY, ENTERED AN ORDER TRANSFERRING THIS CASE TO HIS DOCKET AFTER IT HAD BEEN PENDING BEFORE OTHER FEDERAL JUDGES FOR TWO YEARS; STATED AT A CONFERENCE HE WAS NOT HOLDING A HEARING AND THEN ENTERED AN ORDER HOLDING THAT HE HAD HELD A HEARING; WHERE THE MOTION TO SUPPORT THE FINDINGS WERE FILED BY SOME RESPONDENTS 30 DAYS AND MORE FOLLOWING THE ORDER; AND ERRED IN APPLYING COLLATERAL ESTOPPEL OR RES JUDICATA IN THE CASE OF *NANCY G. SMART V. CLARENCE JONES ET AL* AS THE TRIAL JUDGE SARAH T. HUGHES IN THAT CASE HAD RULED AT THE REQUEST OF RESPONDENT JOHN TOLLE THAT THE CASE OF *DON M. SMART V. CLARENCE JONES* WAS NOT TO ENTER THE CASE OF *NANCY G. SMART V. CLARENCE JONES.*

It is one thing for a judge to have been employed by a Respondent at a prior time and quite another thing to couple this with an order transferring a case to his docket after it had been pending before other federal judges for two years.

In a conference before the trial judge on December 19, 1974, he specifically emphasized he was not having a hearing (Tr. Vol. II, p. 4, line 3). Petitioner is still waiting for a hearing as he has filed some seventeen motions which have never been heard or ruled on by the trial court.

None of the Respondents' answers even set forth collateral estoppel or res judicata as an affirmative defense as required by Rule 8(c) Fed. R. Civ. P. It was not within any of the exceptions provided for presenting defenses by motion pursuant to Rule 12(b) Fed. R. Civ. P.

In the trial of *Nancy Gayle Smart v. Clarence Jones et al*, No. CA-3-6478-B, trial Judge Sarah T. Hughes specifically stated the case of *Dr. Don M. Smart v. Clarence Jones et al*, No. Ca-3-7646-C would not be gone into (Tr. p 330). In that case the Petitioner was not a party, had no pleadings and at the conclusion no issues were presented to the jury for their determination, nor does the jury findings or judgment of the court contain any reference to the cause of action, which took place at a different time and place without any cogent circumstances in common. The Senior District Court Judge has ruled that the case of *Dr. Smart v. Clarence Jones* had been gone into in the *Nancy G. Smart* case although Judge Sarah T. Hughes had specifically held at the request of the Respondent Tolle that she was not going into the suit of Dr. Smart.

This "Alice in Wonderland" decision does not find a judge to be prejudicial when defendants before him were former employers and a law partner, that he was actually holding a hearing when he stated he was not holding a hearing, that collateral estoppel or res judicata would apply in a case in which the presiding judge had specifically ruled that no other case

was to enter the trial. Of course, this judicial juggling act confers benefits on public servants in Dallas County.

4. THE DECISION BELOW ERRED IN DISMISSING THE CAUSE OF ACTION AGAINST JUDGE JOHN ORVIS BASED UPON JUDICIAL IMMUNITY AS DENIAL OF DUE PROCESS AND EQUAL PROTECTION OF THE LAW PURSUANT TO THE FIFTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES.

Judicial immunity is judge created for obvious reasons. Petitioner is a physician and attorney and as a physician is subject to malpractice actions based upon such artificial rules of law and evidence as informed consent, the statute of limitations does not begin to run until discovery, res ipsa loquitur on facts of medicine that are not common knowledge to laymen, and now subject to a new tort called outrage. In this age of consumerism Petitioner is a consumer of justice and no greater respect could be engendered for the judiciary than setting aside judge created immunity and taking a position in society as a responsible profession and be liable for their acts. Such trite answers as who would judge least he be judged is contrary to logic and the experience of other professions. The time has come to abolish such outdated self-serving legal principles. Judge Orvis had a duty to dismiss the criminal prosecution against Petitioner when it was unequivocally shown as a matter of law that Respondent Grandstaff did not have a civil process and he had a further duty to rescue Petitioner from criminal charges that had no substance as the District Attorney judicially confessed in his dismissal. It is only when the judiciary accepts responsibility for their own acts that we will have a conscientious effort to uphold the Constitution. This unequal protection of the law allows the

judiciary to escape liability for their negligence when other professions are facing expanding liabilities.

In the alternative it is not a judicial function to delegate judicial duties to a clerk in issuing a paper, capias, that is illegally being used as an arrest warrant. Judge Orvis had the power to prevent such ministerial shenanigans in order for the District Attorney to act as prosecutor and judge. It must be noted the Clerk is the employee of the County Clerk, a separately elected official. His official functions are in no manner judicial or that of magistrate.

It must be further noted the alleged judicial order of the capias demanded your Petitioner be taken before the judge "instanter". There is no showing the Respondents' total disregard of the order has occasioned any judicial reaction.

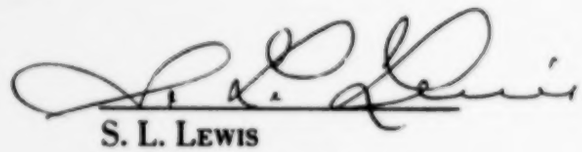
CONCLUSION

Dr. Smart was unlawfully arrested in his office while examing medical patients after a magistrate had turned down Respondents for an arrest warrant and with the help of the District Attorney they secured a capias in order to by-pass the magistrate. The Fifth Circuit Court mistakenly affirmed the dismissal of Texas Power & Light Company not realizing it was a separate, unrelated condemnation case involving Dr. Smart in which the commissioners' award was drawn down some two years before the present case was even initiated. The trial judge who had previously been employed by a Respondent and was a law partner of another Respondent, understandably would transfer this case to his docket in order to dispose of it. He entered an order which held a hearing had been had, although he stated specifically he was not holding a hearing, and overruled trial Judge

Sarah T. Hughes who had specifically set forth that the case of Dr. Don Smart was not to enter the case of Nancy G. Smart. The time is ripe for the judiciary to shed their judicial immunity and accept their professional responsibilities as all other professionals are so held. This case represents a flagrant abuse of power by public officials for the benefit of a gigantic corporation and public servants.

This case is of national significance on the institution of a procedure for arrest on a clerical order to "by-pass" the fundamental requirement no citizen shall lose their liberty and be incarcerated without the actual and conscious intervention and order of a judicial officer or magistrate, and that his name be signed to such an arrest and commitment order; therefore writ of certiorari should issue to review the judgment and opinion of the Fifth Circuit.

Respectfully submitted,



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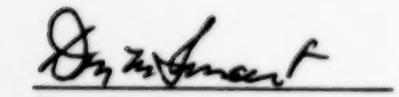

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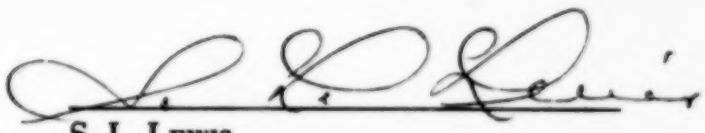
CERTIFICATE OF SERVICE

I, S. L. Lewis, a member of the Bar of the Supreme Court of the United States, hereby certify that I have served the foregoing petition for writ of certiorari on counsels for Respondents (three copies each), by depositing same in the United States mail, postage prepaid, on August 16, 1976, addressed to Frank Ryburn, Attorney for Texas Power & Light Company, 1522 Fidelity Union Life Building, Dallas, Texas 75201, and John B. Tolle, Assistant District Attorney, Dallas County Courthouse, Dallas, Texas 75202, Earl Luna, Attorney at Law, 1002 Dallas Federal Savings Building, Dallas, Texas 75201, and Wayne Pearson, Attorney at Law, 1511 Fidelity Union Building, Dallas, Texas 75201, counsels of record for Respondents.



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